BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CLARK A. SMITH	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,451
K C DRYWALL CONSTRUCTION	)	
Respondent	)	
AND	)	
	)	
CGU HAWKEYE INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 10, 2000 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

This is a claim for a September 1, 1998 accident and resulting injuries to the left upper extremity, neck, and low back. Judge Howard found that claimant's present need for medical treatment was caused by a later accident and, therefore, denied claimant's request for temporary total disability and additional medical benefits.

Claimant contends the Judge erred. Claimant argues that the later incident, which occurred on March 22, 2000, did not constitute an accident as defined by the Workers Compensation Act and that the incident merely exacerbated the chronic neck problem that claimant developed as a result of the September 1998 accident.

Conversely, respondent and its insurance carrier contend the Order should be affirmed as it is amply supported by the evidence.

The only issue before the Appeals Board on this review is whether claimant's present need for medical treatment is related to the September 1, 1998 accident that claimant sustained while working for respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board finds as follows:

1. The preliminary hearing Order should be affirmed.

2. On September 1, 1998, claimant injured his neck and back while working for respondent as a drywall installer. That accident is the subject of this claim.

3. Claimant received treatment from Dr. Stephen Reintjes, a neurosurgeon. Dr. Reintjes did not recommend surgery but, instead, referred claimant to Dr. Mark Killman, a physical medicine doctor. In June 1999, Dr. Killman released claimant from treatment without restrictions. Dr. Killman wrote, in part:

> . . . Complaints of cervical radiculopathy and decreased cervical range of motion, which are difficult to objectify on physical exam, and the examination, once again, is quite variable. I have no physiologic explanation of the patient's decreased cervical range of motion, and suspect that it may be largely self-limited. I do not have any further suggestions for treatment, as the patient is now greater than six months out from his accident, and the clinical findings do not support that of an active cervical radiculopathy. I again do not see any reason the patient cannot return to his previous activities, without restrictions, and [I] would not give him any formal restrictions at this time, but would state that he is limited by his own ability to withstand pain, and that there is not a medical contraindication to him returning to work.

4. The Judge appointed Dr. David J. Clymer to perform an independent medical examination. Dr. Clymer saw claimant on October 18, 1999, and diagnosed cervical disk bulging and lumbar strain with myositis. The doctor's October 18, 1999 letter to Judge Howard reads, in part:

> . . . Pending further evaluation with the MRI scan as noted above I believe some general comments can be made with regard to [an] impairment rating. At this time based upon the cervical disk bulging with some nerve root symptoms I feel he [claimant] has an impairment rating of 10% due to cervical disk injury. With regard to the low back I feel this is most likely lumbar strain with myositis probably associated with some mild degenerative disk changes but without significant disk herniation. Assuming the MRI scan does not demonstrate a more significant disk problem I feel he has somewhat more limited impairment of the low back, probably only 3% of the body as a whole. I would not impose any specific restrictions with regard to these problems but would allow this gentleman to continue to work at whatever level his strength, comfort, and endurance would allow.

In addition to the MRI scan, Dr. Clymer recommended cervical epidural steroid injections.

5. In July 1999, claimant began working in the flooring department of the Home Depot store in Independence, Missouri. On March 22, 2000, claimant experienced an increase in neck pain when he lifted a three-foot-by-five-foot rug for a customer. Following that incident, claimant sought treatment from his personal physician, Dr. Debra S. Smithson. The history that claimant provided Dr. Smithson on March 25, 2000, was that he injured his neck pulling a rug out of a box for a customer. At that office visit, Dr. Smithson diagnosed "chronic neck pain with discogenic disease and radicular component with now re-injury."

In an April 18, 2000 letter to claimant's attorney, Dr. Smithson wrote that the incident at Home Depot aggravated a preexisting condition as it exacerbated the chronic neck problem that claimant has experienced since the September 1998 accident.

6. Before the March 2000 incident at Home Depot claimant was able to work. There has been a definite and significant change in claimant's condition as a result of that incident. Therefore, the Appeals Board affirms the Judge's conclusion that claimant aggravated his neck while working at Home Depot. It is that flare-up or aggravation that now prevents claimant from working and that has caused the need for additional medical treatment. Whether that aggravation is temporary or permanent remains to be seen.

7. Claimant argues that the Home Depot incident could not constitute an accident or an injury as defined by the Workers Compensation Act. The Appeals Board disagrees. The Act provides that "accident" is not to be construed in a strict and literal sense but construed in such a manner that the employer bear the expense of accidental injury.[1] Further, personal injury does not require that the lesion or physical change in the body be visible or present external signs.[2] Certainly, lifting an object is an activity that is capable of causing injury and, thus, constituting an accident.

8. Because claimant has failed to prove that the present need for medical treatment is directly related to the September 1998 accident, the request for preliminary benefits should be denied.

9. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.[3]

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[1] See K.S.A. 44-508(d).

[2] See K.S.A. 44-508(e).

[3] K.S.A. 1999 Supp. 44-534a(a)(2).

WHEREFORE, the Appeals Board affirms the May 10, 2000 preliminary hearing Order entered by Judge Howard.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

c: William W. Hutton, Kansas City, KS
Michael H. Stang, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director